No. 2311

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA TREADWELL GOLD MINING COMPANY (a corporation), et al.,
Appellants,

vs.

ALASKA GASTINEAU MINING COMPANY (a corporation),
Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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APPELLEE'S PETITION FOR A REHEARING.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellee respectfully asks that the decision of this Honorable Court made in this cause on the 18th day of May, 1914, be set aside and a rehearing granted.

It asks this because the Court has, *without discussing or deciding two of the three vital points in the case,* ordered a dismissal of the bill. With the utmost respect we say that this has worked a grave injustice on the appellee.

The appellee and the appellants had a contract, under which, if the appellee deeded certain leased

property to the appellants, it was to receive from the appellants certain uninterrupted electrical current, or power. The appellee deeded the property to the appellants and the appellants have the property; this is conceded. But, the appellants do not give the appellee the agreed current or power. This suit was brought to compel them to do so.

The contract provides that, if the appellee elected

> "to take a current of not to exceed three hundred (300) electric horsepower which shall be taken from and at the generating plant to be installed upon the leased premises hereinbefore described, the lessees (appellants) *undertake, covenant and agree to deliver said current* to the lessor or its assigns (appellee) upon the execution and delivery by the lessor or its assigns to the lessee of a deed or deeds conveying said leased property herein described to the lessees" * * * "The provisions herein as *to the delivery* of three hundred (300) horsepower at the generating plant to be installed on the premises herein described contemplates *the delivery of an uninterrupted current*" (Tr. pp. 36-38).

The appellee in its bill claimed, *first,* that the appellants were not delivering to it an *uninterrupted* current; *second,* that it was entitled to a *real* current and not to a *theoretical* current, and *third,* that the appellants should furnish current enough to overcome the inertia of the machinery of the appellee, so that it could utilize the 300 horsepower.

The Court below decreed:

First: That the appellee is entitled to an uninterrupted current of 300 horsepower.

Second: That the appellee is entitled to a real actual current of 300 horsepower, as distinguished from an apparent current; that is to say, that the strength of the current is to be measured by the standard current measuring device, namely, a Wattmeter, and not by theoretical calculations.

Third: That the appellee is entitled to such reasonable current, called a surge, as may be necessary to start its motors for utilizing the 300 horsepower agreed to be delivered.

This Court has disposed of the case by discussing and deciding only that the appellee is not entitled to the surge, or extra momentary current, sufficient to start its machinery. THE COURT HAS NOT DISCUSSED, AND IT HAS NOT DECIDED THE RIGHT OF THE APPELLEE TO AN UNINTERRUPTED CURRENT, NOR THE RIGHT OF THE APPELLEE TO HAVE ACTUAL INSTEAD OF APPARENT CURRENT. BOTH RIGHTS ARE OF VITAL IMPORTANCE TO THE APPELLEE.

THE AGREEMENT FOR AN UNINTERRUPTED CURRENT.

The contract provides *for the delivery* of an *uninterrupted current* of 300 horsepower. This is definitely stated in the last paragraph. It is not denied; it is not disputed, nor could it be.

The bill alleges that the appellants have so connected the power lines of the appellee with their generating plant that the current is frequently interrupted, to the great loss of the appellee (Tr. pp. 23 and 24). The finding of the Court below supports this allegation (Tr. p. 1155).

The evidence shows that the appellants have constructed a plant capable of producing between 2500 and 3000 horsepower. By connecting the power lines of the appellee with this plant, they shut off the power from the appellee as soon as the current exceeds 300 horsepower. This is done by means of an instantaneous circuit breaker installed by and entirely under the control of appellants. Instead of delivering a current of only 300 horsepower to the appellee, as they have agreed to do, and so that the circuit breaker could not operate, the appellants, as soon as the appellee opens the switch, throw in the full current, far in excess of 300 horsepower; instantly the circuit breaker operates and deprives the appellee of all power. The appellee has no control over the current which operates the circuit breaker; the appellants themselves control the current, and *by delivering more than the agreed current, they cause the circuit breaker to operate and, during long interruptions, they deprive the appellee of all current. But the appellants have no right whatever to deliver current in excess of 300 horsepower and then to shut it off because it exceeds 300 horsepower.*

In its opinion the Court says:

> *"There is nothing in the written contract requiring the latter to deliver power."*

Perhaps a distinction is here drawn between "current" and "power"; but the parties used the words interchangeably. They are so used every day. "Current" is the term in ordinary use to denote electric force in a state of action. The strength of "current" is expressed in horsepower or kilowatts. A good basis

of comparison to the expression "a current of electricity of 300 horsepower" is afforded by the expression "a bolt of silk of 300 yards", "current" being equivalent to "bolt", "silk" being equivalent to "electricity" and "300 yards" being equivalent to "300 horsepower". We submit it could not be said that a contract, to deliver a bolt of silk of 300 yards was not a contract to deliver 300 yards of silk because there is a contract to deliver not "yards of silk" but a "bolt".

By the contract in the case at bar, "the lessees undertake, covenant and agree to *deliver* said current to the lessor", and again, "The provisions herein as to the *delivery of three hundred horsepower"*, etc. *They are not to deliver 500 or 600 or 2500 or 3000 horsepower or more, out of which the appellee is to take 300 horsepower.* They have covenanted, contracted and agreed to deliver a current of 300 horsepower; if they desire to deliver it out of a 2500-3000 horsepower current, then, manifestly, their plain duty is to adopt such mechanical devices as will reduce the current delivered to 300 horsepower. If they kept their covenant and delivered an uninterrupted 300 horsepower current, there would be no occasion for a circuit breaker.

When the circuit is broken, the appellants consume some five or six hours in sending a small boat across Gastineau Channel to their generating plant to throw the lever, on the circuit breaker—a momentary job which any child could perform. Then when the current is used again, and as soon as it exceeds 300

horsepower, there is another similar interruption. The appellants plainly violate their covenant to deliver "uninterrupted current", and, because of the unfortunate friction which has developed between the parties, they see to it that the interruptions are as long as possible.

To illustrate our contention: Suppose, a water company had a contract to deliver an uninterrupted supply of water, say, not to exceed one hundred miner's inches to a consumer, to be taken from the company's ditch which carried, say, one thousand miner's inches of water, and to be taken at an intake, all entirely constructed by and under the control of the company, the company having also constructed an automatic gate which would shut off the supply of all water from the consumer in the event that the amount delivered to him should exceed the one hundred miner's inches, could it, under any pretext, be claimed that the company could interrupt this supply by diverting into the intake of the consumer in excess of the one hundred miner's inches? The company would most obviously be obliged to regulate the supply of water delivered to the consumer, so that the same would not exceed the one hundred miner's inches agreed to be delivered.

The Court below saw the intolerable condition of affairs in this case and gave the appellee relief.

The decree of this Court, dismissing the bill, throws the appellee out of Court; it deprives it of the right to uninterrupted current, for which it has deeded valuable property, and it leaves the appellants in pos-

session of property without the agreed consideration for the same.

The evidence shows that the application of an uninterrupted current of 300 horsepower to the machinery of the appellee would start the same (Tr. 249). If such a current were delivered, the appellee could, without interruption, and as agreed and paid for, use the power to which it is entitled. But, the appellants, after having installed an instantaneous circuit breaker, turn on a current far in excess of 300 horsepower, so as to cause the circuit breaker to operate and to deprive the appellee of all power. *They take advantage of their own wrong. In this they are confirmed by the decree of this Court.* This is manifestly unjust.

THE APPELLEE IS ENTITLED TO ACTUAL AND NOT THEORETICAL HORSEPOWER.

The contract calls for the delivery and use of a current of 300 electric horsepower. The bill alleges that, *by reason of a theoretical method of measuring the horsepower, instead of by an actual measurement of the same, the appellee is receiving 210 instead of 300 horsepower* (Bill, paragraph XVI; Tr. pp. 20 and 21). The trial Court decreed that the electric current, instead of being measured in a theoretical manner, should be actually measured by the meter in every day use for measuring power, namely, a Wattmeter (Tr. p. 1093). *This relief was one of the principal grounds for filing the bill.*

The testimony of EVERY WITNESS in the case, on both sides, is that it was the universal custom to measure electrical current in terms of horsepower by the Watt-meter (Tr. p. 1204). The parties contracted with reference to this custom; to disregard it, is to destroy their intention. It might as well be said that a contract for the delivery of a certain number of ounces of a commodity, universally weighed upon avoirdupois scales, is complied with by the delivery of the same number of troy ounces of that commodity.

This subject is not discussed in the prevailing opinion of the Court.

Conclusion.

We have made this petition as brief as we could, consistently with our effort to point out that, through inadvertence, the prevailing opinion of this Court has, perhaps, entirely failed to discuss two of the three vital points in this case. If we have succeeded in our effort, then, we submit, we have shown good cause for a rehearing.

We realize that there is much occult and technical knowledge pertaining to the use of electricity (all of a very modern date) which might not fall within the experience or general knowledge of the Judges of this Court.

If this cause stands concluded without a further hearing, it will turn the appellee out of Court with its property gone and two of its essential claims unde-

termined; on the other hand, if a rehearing is had, no possible prejudice can come to the appellants, for they have the property and they are, through a writ of supersedeas, relieved, pending the appeal, from a compliance with parts of the decree of the Court below. An additional labor, to be made as light as possible by the appellee, will, of course, if a rehearing is granted, be cast upon this Court. But the importance of the case and the technical nature of the questions involved, we submit, justify the granting of the application.

It is to be noted that the mandate has been stayed to November 1st. If the Court should grant this petition, it could then at its Seattle session order the case argued and submitted in October, and the case could be decided before the time for the stay of the mandate expires.

Dated, San Francisco,
July 1, 1914.

Respectfully submitted,
L. P. Shackleford,
Alfred Sutro,
Attorneys for Appellee and Petitioner.

Certificate of Counsel.

I hereby certify that in my judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

Alfred Sutro,
Attorney for Appellee and Petitioner.